United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL

77-7181

United States Court of Appeals

For the Second Circuit

Docket No. 77-7181

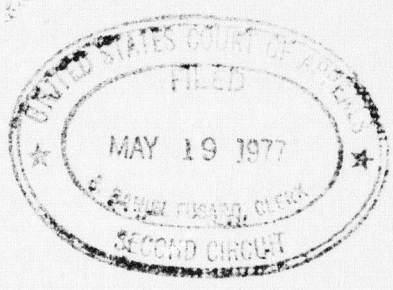
ALLEN BREISBLATT, PAULA BREISBLATT, THOMAS A. OLSEN, DEBRA F. OLSEN, JAMBERT W HOLST, DOROTHY MOBLEY, RICHARD A. HLAVENKA, JUDITH HLAVENKA, THORTON McCOY AND EDNA McCOY,

Plaintiffs-Appellants,

v.

BAKER-FIRESTONE, INC. and EDWIN J. GEHER,

Defendants-Appellees.



APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APELLANTS' BRIEF

Edelman & Jennings
Attorneys for Plaintiffs-Appellants
277 Broadway
New York, New York 10007
(212) 349-2181

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UNITED STATES COURT OF APPEALS
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RICHARD A. HLAVENKA, JUDITH HLAVENKA,
THORTON McCOY and EDNA McCOY,

Appellants,

-against-

BAKER-FIRESTONE, INC. and EDWIN J.
GEHER,

Appellees.

----------x

APPELLANTS' BRIEF

STIPULATION OF FACTS

The attorneys for the plaintiffs and defendants herein, have stipulated and agreed to the following:

Parties:

Baker-Firestone, Inc., a defendant, is the former owner of residential units in the Granada Condominum III, purchased by the plaintiffs.

All of the plaintiffs are purchasers of residential units in Granada Condominum III, having purchased their units from Baker-Firestone, Inc.

Edwin J. Geher is a vice-president of Baker-Firestone, Inc.. He certified, on behalf of Baker-Firestone, Inc. that the respective units purchased by the respective plaintiffs had "never been offered for sale in a listing, a written private offer, or an offer by means of advertisement, at a lower purchase price . . ." (copies of said certifications are annexed to plaintiffs' complaint).

Facts

Between November 1, 1974 and February 15, 1975, the plaintiffs contracted to purchase units in Granada Condominium III from Baker-Firestone, Inc.. Title to all of these units was closed in June and July of 1975, at the prices set forth in the respective contracts; copies of which are annexed to plaintiffs' complaint.

In April of 1975, after all of the aforesaid contracts were signed between Baker-Firestone, Inc. and the plaintiffs, but before any of the closings had taken place, Baker-Firestone, Inc., made an offer to sell units by advertisement.

This offer was for all non-contracted for units, including units of the exact same models as contracted for by plaintiffs in Granada Condominium III (with an abatement of carrying charges for a period of one year if the units were

purchased on or before July 31, 1975). Baker-Firestone, Inc. did not extend this offer to any contract vendee for units already under contract, and refused to apply said offer to the plaintiffs. The offer, however, did extend to units which had not been contracted for as of April 1, 1975, including units constructed on the exact same models as units being purchased by the plaintiffs.

On the date of each closing Edwin J. Geher certified on behalf of Baker-Firestone, Inc. "that this residence has never been offered for sale in a listing, a written private offer, or an offer by means of advertisement at a lower purchase price . . .". This certification was made in an attempt to comply with Section 44 of the Internal Revenue Code so that the plaintiffs could obtain tax credits for the purchase of new residences.

The plaintiffs do not contend that Baker-Firestone, Inc., prior to signing contracts with the plaintiffs, offered plaintiffs units for sale at a lower price.

The parties agree that the contract prices, purchase prices and monthly and yearly carrying charges set forth in the complaint are correct.

Questions of This Appeal

1. Does the date of closing fix the time of certification of lowest price offered?

2. Does an offer to sell comparative models at a lower price than the contract price of previous models prior to closing but after date of contract constitute an offer to sell at a lower price?

3. Was the certification false entitling appellants to damage?

POINT I

PLAINTIFFS ARE ENTITLED TO TAX CREDIT FOR PURCHASE OF NEW RESIDENCE UNDER 1975 TAX REDUCTION ACT:

Title 26 U.S.C. Section 44 (Internal Revenue Code, 1954, as amended June 30, 1976), hereinafter "I.R.C.", states in part:

> "(a) General rule - In the case of an individual there is allowed, as a credit against the tax imposed by this chapter for the taxable year, an amount equal to 5 percent of the purchase price of a new principal residence purchased or constructed by the taxpayer."; and
>
> "(c) Definitions - For purposes of this section-
> (1) New Principal residence - The term "new principal residence" means a principal residence (within the meaning of section 1034), the original use of which commences with the taxpayer, and includes, without being limited to, a single family structure, a residential unit in a condominium or cooperative housing project, and a mobile home." (emphasis added); and
>
> "(e) (4) Certifications must be attached to return. - This section does not apply to any residence (other than a residence constructed by the taxpayer) unless there is attached to the return of tax on which the credit is claimed a written certification (which may be in any form) singed by the seller of such residence that - -

(A) construction of the residence began before March 26, 1975, and
(B) the purchase price of the residence is the lowest price at which the residence was offered for sale after February 28, 1975."

Defendant Baker-Firestone, Inc. offered plaintiffs certain residential units in a residential structure known as Granada Condominium III, said offer for sale being on the basis of models at a specified base price.

Plaintiffs in turn, accepted defendants' offer, and purchased their respective residential units on the basis of the models which they were shown and the various prices for the respective models.

On the closing date for title, defendant Geher, for and on behalf of defendant Baker-Firestone, Inc. certified that plaintiffs' respective residential units had "never been offered for sale in a listing, a written private offer, or an offer by means of advertisement at a lower purchase price. . ."

This certification constituted defendants' warranty to the plaintiffs that their residential units were purchased at the lowest price offered by the seller, and that plaintiffs and defendant, Baker-Firestone, Inc., were in full compliance with the terms of I.R.C. Section 44, thus entitling plaintiffs

to the benefits of certain tax credits provided for thereunder.

The gravaman of the dispute between plaintiffs and defendants is that plaintiffs claim that the aforesaid certification was false and defendants deny the validity of plaintiffs' claim.

The Federal Tax Regulations which interpret I.R.C. Section 44 (hereinafter "Regs.") clearly substantiate plaintiffs claim.

POINT II

DEFENDANT FALSELY CERTIFIED THAT UNITS PURCHASED BY PLAINTIFF WAS THE LOWEST PRICE OFFERED FOR SALE AFTER FEBRUARY 28, 1975:

As defendants have stipulated that during the hiatus between the execution of the purchase contracts by the plaintiffs and the closing of title to their respective residential units, that defendant Baker-Firestone, Inc. did offer, by advertisement, to sell other residential units "constructed on the same exact models as units being purchased by the plaintiffs" with the added inducement of "an abatement of carrying charges for a period of one year if the units were purchased on or before July 31, 1975" they must obviously believe that the aforesaid offer by advertisement did not conflict with the certification presented to each of the plaintiffs at the times of their closings of title.

I.R.C. Section 44 is explicit in its requirements for certification and the Federal Tax Regulations ("Regs.") thereunder breach those requirements down into their component parts lest their be any uncertainty as to their meaning and intent.

On the basis of the stipulated facts, our first consideration should be whether or not defendant Baker-Firestone Inc.'s offer to sell condominium units with a years abatement of carrying charges constitutes an offer to sell those units at a lower price than other units based upon identical models which were offered for sale without the abatement of carrying charges.

I.R.C. Regs. Section 1.44-3 (d) (2) expressly indicates that rebates or the inclusion of additional property not normally included in the sale will reduce the lowest offer. (c.f. P-H Fed. Tax Sec. 5918 (6)).

> "For purposes of determining the lowest offer, where an offer provided for a rebate (e.g., of cash or of a contribution toward mortgage payments) or included, without additional charge or at less than fair market value, property not normally included in the sale of a residence (e.g., an automobile) such offer must be reduced by the amount of such rebate or by the amount by which the fair market value of such property at the time of the offer exceeds the amount paid for it by the purchaser. Thus, where a residence was advertised for sale at $40,000.00 but the seller agreed to pay $200.00 a month on the purchaser's mortgage for 10 months, such residence is considered to have been offered for sale at $38,000.00."

It is beyond comprehension for one to believe that a seller in the above cited example could have rebated the

$200.00 per month and still have had the property offered at $40,000.00 instead of $38,000.00 simply by applying the $200.00 per month to the purchaser's utilities or carrying charges instead of to the mortgage payments.

In the instant case, those persons who purchased residential units identical to those purchased by plaintiffs, but did so pursuant to defendants' offer to pay the carrying charges for one year, paid the same purchase price as the plaintiffs, but did not have to pay i.e. $62.84 per month in carrying charges for the first year unlike the plaintiffs who did not purchase pursuant to this new offer.

Plaintiffs' contentions that this abatement of carrying charges served to reduce the purchase price of the residential units is fully supported by other applicable provisions of the Internal Revenue Code and the appropriate Regulations formed thereunder.

There are two alternatives by which we may characterize the abatement of the carrying charges:

(A) Plaintiffs and purchasers who purchased identical units to those purchased by plaintiffs but pursuant to defendant's later offer, paid the same monies for their units except that the later purchasers received more for their

money, in that the same money also included the services which would be paid for by the carrying charges. Therefore, if defendants were to equalize the consideration purchased by the equal amounts of monies by disallowing the abatement of carrying charges which the later purchasers purchased, defendants would have to reduce the purchase price for those later purchasers by i.e. $754.08. The obvious result would be that the later purchasers paid less money for the same units as the plaintiffs purchased. Therefore, the later offer was the lowest at which those residential units were offered for sale, and the offer made to plaintiffs was higher by i.e. $754.08.

(B) If on the other hand, the purchase price of the later purchasers did not furnish the consideration for the abatement of carrying charges and plaintiffs and later purchasers therefore received the same consideration for their monies, then the later purchasers therefore failed to furnish adequate consideration for the services rendered on their behalf during their first year in residence for which the plaintiffs had to pay carrying charges i.e. $62.84 per month. If this contention proves to be true than defendant have furnished those later purchasers with a gift pursuant to I.R.C. Section 2512 (b), for which services are gift taxes

due, or if the years free services are not a gift, then it must constitute income to the later purchasers pursuant to I.R.C. Section 61, for which the later purchasers give income tax.

> "(a) General definition. Gross income means all income from whatever source derived, unless excluded by law. Gross income includes income realized in any form whether in money, property, or services." I.R.C. Regs. Sec. 1.61-1 (a).

Since Baker-Firestone, Inc., defendant, neither claims that it has made gifts to these latter purchasers nor that these later purchasers received income, we may reject alternative (B) hereinabove, and instead rely on alternative (A).

Alternative (A) leaves us no choice but to conclude that plaintiffs paid a higher purchase price for their residential units than was offered to later purchasers pursuant to defendants advertisement.

POINT III

WHERE CONDOMINIUMS ARE CONCERNED, WHERE UNITS ARE OFFERED ON THE BASIS OF MODELS, AN OFFER TO SELL A SPECIFIED RESIDENCE INCLUDES AN OFFER TO SELL A SPECIFIC TYPE OF UNIT:

The next element of I.R.C. Section 44 which concerns us states that an offer to sell is limited to an offer to sell a specified residence at a specified purchase price.

At first blush, the aforesaid requirement seems to pose a serious problem to plaintiffs as condominium units are purchased on the basis of model type apartments at specified base prices, with no actual individual unit being offered for sale until purchaser selects its' exact unit. Therefore, it would first appear that two identical units offered for sale to two separate purchasers at two different prices would not mean that a seller did not offer each unit to each purchaser at the lowest price offered for each particular unit. The result of this interpretation would be that a seller could sell ten units identical to seller's Modex X unit to ten different purchasers at ten different prices, and nevertheless certify that each unit was sold at the lowest price offered. Therefore, the seller could effectively nullify the restrictive requirements of I.R.C.

Section 44.

I.R.C. Regs. Section 1.44-3 (c) (3) (ii) anticipates the aforementioned anamoly and resolves what at first blush appeared to be a problem.

> "In the case of a condominium or cooperative housing development where units are offered for sale on the basis of models (e.g., all Model C two bedroom apartments sell at a specified base price), an offer to sell a specified residence includes an offer to sell a specific type of unit (with appropriate adjustments to be made for the location of such unit and as provided in paragraph (d) of this section)."

Defendants have already stipulated that an offer made pursuant to their advertisement published after plaintiffs had alresdy executed their contracts of sale but before closing, was made for units "constructed on the exact same models as units being purchased by the plaintiffs."

Defendants' advertisement, annexed to plaintiffs' complaint, informs the prospective purchaser that he can examine "Models open 7 days, 10 to 6". The advertisement also indicates that Granada III 1, 2 and 3 bedroom condominiums sell from a base price of $34,650 to $53,975, and more specifically that a condominium with "3 bedrooms, 2 baths, Country Club enviornment," sells "from $48,825."

Defendants formal prospectus indicates the various Model 1, 2, and 3 bedroom apartments with the base price for each model.

It is inescpable but that defendant Baker-Firestone, Inc. falls within I.R.C. Regs. Section 1.44-3 (c) (3) (ii) as it offered to sell a "specified type of unit" on "the basis of models." Therefore, since defendant Baker-Firestone, Inc. offered identical units based upon modesl to the public at a lower price than offered to plaintiffs, defendants tendered a false certification if plaintiffs can demonstrate in Point IV hereinbelow that they did not acquire their property until time of closing of title.

POINT IV

THE PRICE AT WHICH PLAINTIFFS PURCHASED THEIR RESIDENTIAL UNITS WAS NOT THE LOWEST PRICE OFFERED FOR THESE UNITS BY DEFENDANTS AT THE TIME THEY WERE SOLD TO PLAINTIFFS:

The last and final element for the proof of plaintiffs' case pursuant to I.R.C. Section 44 is that defendants' certification stated that the price at which the respective plaintiffs purchased their residential units was the lowest price offered for these units at the time Baker-Firestone, Inc. sold them to plaintiffs.

Plaintiffs and defendants have stipulated that the plaintiffs "[B]etween November 1, 1974 and February 15, 1975 -(. . .)- contracted to purchase units in Granada Condominium III" and closed titl to those units "in June and July of 19.5". During the interim period between the time of the execution of plaintiffs' contracts and the closing of title (between February 15, 1975 and June of 1975), defendants made a new offer to sell at a lower price; said offer being made by advertisement "in April of 1975".

The issue herein is that if plaintiffs purchased their units at the time of contract, then they purchased them at the lowest price offered at the time of purchase. But on the

other hand, if plaintiffs purchased their property at the time of closing in June and July of 1975, then defendants intervening offer by advertisement constituted an offer to sell at a lower price, resulting in a false certification to plaintiffs.

Under both the Federal statute (I.R.C. Section 44) and the laws of the State of New York, title to the property is deemed to pass to the purchaser at the closing, and not on the contract day.

I.R.C. Regs. Section 1.44-2 (b) entitled "Acquisition and Occupancy" clearly states that:

> "The residence must be acquired and occupied by the taxpayer after March 12, 1975, and before January 1, 1977. For this purpose a taxpayer 'acquires' a residence when legal title to it is conveyed to him at settlement, or he has a binding purchase contract under which he makes periodic payments until he becomes entitled under the contract to demand conveyance of title." (emphasis added).

Defendants do not dispute that none of the plaintiffs contracted to make "periodic payments until (they) become entitled under the contract to demand conveyance of title".

Therefore, for the purposes of I.R.C. Section 44, plaintiffs purchased their property "when legal title to it [was] conveyed to [them] at settlement".

The record clearly shows that defendants are not surprised by the aforesaid rule of law. An examination of the purchase documents and defendants' certification reveals that defendant gave plaintiffs its certification on each respective settlement date and not on the contract date. This indicates that defendant knew that title passed to plaintiffs and that they purchased their property on the closing date and not the contract date. If defendants thought otherwise, they obvioulsy would have given plaintiffs their certifications on their contract dates.

The aforesaid interpretation of the "acquisition" provision of I.R.C. 44 is consistent with other "older" sections of the Internal Revenue Code and should not be unknown to defendant Baker-Firestone, Inc. who, after all, is in the business of real estate.

For example, plaintiffs are sure that defendant Baker-Firestone, Inc. is well aware of the fact that when real property is sold, the purchaser and seller may each claim a deduction for that part of the real property taxes paid or accrued which is proportionate to the number of days during which the seller held the property. The seller is considered to have been the owner of the property during the portion

of the local tax year which ends on the day before the sale. They buyer's period of wonership begins on the date of the sale. Thus, a cash basis taxpayer is permitted the deduction even though he does not make the actual payment, and allocation of sale actually apportions the taxes at all or in such ration [c.f. I.R.C. Sec. 164(d)]. It is the date of passage of title, not the date of contract, which is determinative - Lucas v. North Texas Lumber Co., 281 U.S. 11, 50 Sup. Ct. 184 (1930); Comm'r v. Segall, 114 F.2d 706 (6th Cir. 1940).

Furthermore, as defendant Baker-Firestone, Inc. was doing business in New York, it can safely be assumed that they are aware of New York law regarding the date when a purchaser purchases property. The most common provision of New York law with which a vendor of real property would be familiar is Section 5-1311 of the New York General Obligations Law, hereinafter "N.Y.G.O.L."

The NYGOL states that at any time prior to the vendee's taking title or possession of real property, the risk of loss if all or a mterial part of the property is destroyed or taken by eminent domain, shall fall upon vendor who may

not enforce the contract of sale against the vendee. The statute is clear that legal title passes on the closing settlement day and not on the contract date.

It is abundantly clear that even had defendants been totally unaware of when title passed pursuant to I.R.C. Section 44, that they knew or should have known when title passed for the purposes of New York law and other sections of the Internal Revenue Code under which defendants have been doing business for a number of years.

As the facts and law clearly indicate that defendants offered plaintiffs residential units at a lower price to other prospective purchasers prior to the date on which plaintiffs purchased their property, then we can only conclude that defendants falsely certified that plaintiffs purchase price was the lowest offered prior to plaintiffs purchase date.

The court summarizes the heart of the conflict in the first paragraph of page 6 of its' opinion, and surmises that neither the statutes nor the regulations specifically answer the present problem.

It is of course appellants contention that the regulations do resolve the problem:

With regard to the purchase price the regulations specifically refer to the price on date of acquisition, not on

date of contract,

> "Sec. 1.44-5 (b) Purchase Price (1) General Rule for purposes of section 44 (a) and 1.44-1 the term "purchase price" means the adjusted basis of the new principle residence on the date of acquisition. . ."

therefore the closing date. The only other problem to be resolved was whether the offer of similar residence at the lower April price constituted a lower price visa vie the appellants condominiums. The regulations make specific reference to condominiums units and clearly state

> "In the case of condominium or cooperative housing development where units are offered for sale on the basis of Models. . ." (as was the case herein) "an offer to sell a specific residence includes an offer to sell a specific type of unit".
>
> "An offer to sell a specified residence includes:
> (i) Both an offer to sell an existing residence and an offer to build and sell a residence of substantially the same design or model as that purchased by the taxpayer on the same lot as that on which the taxpayer's new principal residence was constructed." I.R.C. Regs. Section 1.44-3 (c) (3) (i), (emphasis added).

Inasmuch as a lower offer was made to sell a specific type of unit prior to acquisition, the appellees could not certify that appellants condominium was offered at the lowest prices when at date of closing comparable units were being offered at a lower price.

CONCLUSION

The appellants herein purchased units by model which said models prior to acquisition by appellants were offered at a lower price. Clearly the statutes and regulation contemplated variance in prices between date of contract and closing, as it was set forth in the definitions that the date of acquisition (closing) controls whatever the intervening price structure might be.

Nor were model apartments unique as real estate, one model on a plot being a carbon of the others. It was recognized that an offer to sell one included an offer to sell all because there is no difference between them.

To hold that the appellee could lower the price without giving the appellant the benefit of that lower price before closing would be contrary to the intent and meaning of the regulations.

Respectfully submitted,

EDELMAN & JENNINGS
Attorneys for Appellants
By: WALTER S. JENNINGS

STATE OF NEW YORK
CITY OF NEW YORK } ss.:
COUNTY OF NEW YORK

Clyde Pearson, being duly sworn, deposes and says, that he is over 18 years of age. That on the 18th day of May, 1977, he served 2 copies of the attached Appellants Brief on the attorneys for the Defendants Appellees herein by depositing the same, properly enclosed in a securely sealed post-paid wrapper, in a U. S. Post Office at 90 Church Street, New York City, directed to said attorneys ~~at~~ as follows:

D'Andrea & Goldstein, Esqs.
100 Stevens Avenue
Mt Vernon, New York 10550

that being the place where they maintain ~~an~~ offices for the regular transaction of business, and the last address mentioned in the papers last served by them

Clyde Pearson

Sworn to before me this
19th day of May, 1977.

Monroe D. Rosen

MONROE D. ROSEN
Notary Public, State of New York
No. 24-4616690
Qualified in Kings County
Commission Expires March 30, 1979